INDEX

CITATIONS

Cases:

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 619

WHITE MOTOR COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the United States moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of the district court in a civil antitrust case, entered on the government's motion for summary judgment. The court held that provisions in franchise contracts between appellant and its distributors and dealers, limiting the areas in which, the persons to whom, and the prices at which, such distributors and dealers may resell appellant's products, were illegal *per se* in violation of Sections 1 and 3 of the Sherman Act. The

judgment enjoined appellant from entering into and enforcing any such contractual provisions.

The basic facts, as found by the court, are undisputed (J.S. 21).

Appellant is one of the leading United States manufacturers of medium to heavy-duty trucks; its annual sales of trucks and truck parts exceed $100,000,000 (J.S. 23). Appellant sells its products to the ultimate consumers through distributors (who resell at both wholesale and retail) and through various categories of retail dealers who purchase the trucks and parts either from it or from distributors (J.S. 22). At the time of this case, appellant had approximately 250 distributors and 110 dealers (J.S. 24). Appellant also sells directly to certain consumers and to various government agencies (J.S. 23).

Appellant's distributors and dealers operate under standard form selling agreements. Under these agreements, the distributor or dealer (1) is granted the exclusive right to sell in a designated territory, (2) agrees to sell only to purchasers having a place of business or purchasing headquarters in that territory, (3) agrees not to sell for resale or to any federal or State government or subdivision thereof, or, in some instances, not to certain designated customers (except with appellant's permission), and (4) is required to sell at prices and discounts fixed by appellant.[1] The selling agreements provide that the distributors and dealers are not agents of the appellant (J.S. 29, 32).

[1] The pertinent provisions of the agreements are set forth in the opinion of the district court (J.S. 25–32).

Appellant admitted most of the allegations in the government's complaint, but denied that it had violated the Sherman Act (J.S. 21). Following pretrial discovery proceedings, the government moved for summary judgment on the basis of the pleadings, appellant's answers to interrogatories, the deposition of appellant's Secretary, and various documents the Secretary identified during the deposition (J.S. 21). Appellant filed no opposing affidavits, exhibits, or depositions, but set forth in its brief the ultimate facts which it proposed to prove at a trial. Among those facts were: that the truck industry is "extremely competitive," that the restrictive clauses in appellant's franchise contracts enable it to compete more effectively against its rivals, and that appellant "will lose many competent distributors and dealers" if it is not permitted to guarantee them freedom from competition by other White dealers in their respective territories (J.S. 35–36).

The court granted the government's motion for summary judgment (J.S. 67). It held (J.S. 36; see J.S. 66) that there was "no genuine issue as to any material fact upon which the Government relies." After reviewing the provisions of the various agreements and the pertinent judicial precedents (J.S. 24–63), the court concluded (J.S. 66–67) that the "plain purpose and effect" of the challenged provisions in appellant's selling agreements "is to eliminate and suppress competition by fixing certain resale prices of White trucks and parts, by allocating customers and by dividing sales territories among competitors

or potential competitors; that the contracts containing such provisions directly affect interstate commerce and, as a matter of law under the authorities cited and discussed above, constitute contracts and combinations which, on their face, unreasonably restrain trade and commerce among the several states of the United States and the District of Columbia, in violation of Sections 1 and 3 of the Sherman Act." It ruled (J.S. 36) that the facts which appellant offered to prove at the trial "have no materiality to the issues presently before the Court, namely, whether the admitted facts disclose *per se* violations of the Sherman Act."

The court's judgment (J.S. 70–74) adjudged that the provisions in appellant's selling agreements which "impose limitations or restrictions on the territories within which, or persons or classes of persons to whom distributors and dealers may sell trucks," and which "obligate distributors and dealers to sell trucks and parts at prices or discounts established by the defendant," are "unlawful, illegal, null and void." The court enjoined appellant from "entering into, adhering to, maintaining, enforcing or claiming any rights under" such provisions (J.S. 72).

ARGUMENT

I

The district court held that the provisions in appellant's distributor and dealer franchise agreements limiting the territories in which, and the persons to whom, such distributors and dealers may sell, are on their face unreasonable restraints of trade in

violation of Sections 1 and 3 of the Sherman Act; and that the economic justification which appellant offered for such restrictive provisions was therefore immaterial.[2] The appeal does not present a substantial question because the issues have all been resolved, against appellant's contentions, by prior decisions of this Court, particularly by *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707.

A. *Bausch & Lomb* involved the validity, under Sections 1 and 3 of the Sherman Act, of the distribution system of Soft-Lite eyeglass lenses. Soft-Lite sold its lenses to wholesalers who, in turn, sold them to retailers (p. 710). "Soft-Lite's wholesalers were allowed to resell only to retailers who held licenses from Soft-Lite" (p. 714). "Soft-Lite indicated to the wholesalers the prices to be received by them from retailers by means of published price lists," and "the retailer[s were] required to maintain prevailing local price schedules" (p. 715).

The district court held that Soft-Lite had contracted and conspired with wholesalers and retailers to violate the Sherman Act

> * * * (b) by entering into so-called "license" agreements with optical retailers which provide that said retailers will sell such lenses only to the public; (c) by entering into agreements with wholesale customers which provide that the said wholesalers will sell Soft-Lite lenses and blanks only to retailers who are designated

[2] Appellant does not challenge the district court's holding that the price maintenance provisions in its selling agreements are illegal (J.S. 8–9).

as "licensees" by the defendant Soft-Lite Lens Company, Inc. * * * [p. 717].

In affirming the holding that such agreements were illegal, this Court stated (p. 721, emphasis added):

> Soft-Lite is the distributor of an unpatented article. It sells to its wholesalers at prices satisfactory to itself. Beyond that point it may not project its power over the prices of its wholesale customers by agreement. A distributor of a trade-marked article may not lawfully limit by agreement, express or implied, the price at which or *the persons to whom its purchaser may resell*, except as the seller moves along the route which is marked by the Miller-Tydings Act. * * * Even the additional protection of a copyright * * *, or of a patent * * *, adds nothing to a distributor's power to control prices of resale by a purchaser. *The same thing is true as to restriction of customers.* * * *

The Court further pointed out (p. 723, emphasis added):

> So far as the wholesalers are concerned, Soft-Lite and its officers conspired and combined among themselves and with at least some of the wholesalers to restrain commerce by designating selected wholesalers as sub-distributors of Soft-Lite products, by fixing resale prices and *by limiting the customers of the wholesalers* to those recommended by the wholesalers and approved by Soft-Lite—all in violation of the Sherman Act. * * *

Thus, *United States* v. *Bausch & Lomb* plainly governs the present case. The efforts to fix the re-

sale price are indistinguishable; in each instance the manufacturer required the distributor to agree to adhere to the resale prices which the manufacturer established.[3] In the *Bausch & Lomb* case the distributor was required to limit his customers to persons approved by Bausch & Lomb whereas appellant defines the limitation also by a geographical restriction; but the distinction is irrelevant because the basic vice of both schemes is the same—each involves an unlawful attempt by a manufacturer to limit competition in the distribution of its product after it has sold it to others. *Bausch & Lomb* makes it clear that such an attempt is illegal whether its purpose is to "limit * * * the price at which or the persons to whom its purchaser may resell * * *" (321 U.S. at 721). It is immaterial whether the ultimate purpose of controlling the customers to whom the products were resold is, as in *Bausch* v. *Lomb,* to effectuate a direct price-fixing scheme or, as appears in the present case, to eliminate competition for customers.

The holding in *Bausch & Lomb* that a distributor who parts with all interest in its product cannot control "the persons to whom its purchaser may resell" was not novel. It rested upon this Court's decision in *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.,* 220 U.S. 373. In that case the Court held that agreements by which a drug manufacturer required its wholesalers and retailers to resell at prices it fixed constituted illegal restraints of trade. The Court

[3] As noted (note 2, p. 5, *supra*), appellant does not challenge the holding that the price-fixing aspects of its distribution system are illegal.

pointed out that "a general restraint upon alienation is ordinarily invalid" (p. 404); that "[t]he agreements are designed to maintain prices, after the complainant has parted with the title to the articles, and to prevent competition among those who trade in them" (p. 407); and that the manufacturer "having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic" (p. 409). The Court quoted (pp. 404–405) Lord Coke's statement that "if a man be possessed of a lease for years, or of a horse or of any other chattel * * * and give or sell his whole interest or property therein upon condition that the donee or vendee shall not alien the same, the same [condition] is void, because his whole interest and property is out of him * * * and it is against trade and traffic, and bargaining and contracting between man and man." Coke, *Commentary upon Littleton*, section 360; accord, *Boston Store* v. *American Graphophone Co.*, 246 U.S. 8, 21–25; *Straus* v. *Victor Talking Mach. Co.*, 243 U.S. 490, 500–501; cf. *Adams* v. *Burke*, 17 Wall. 453.

Other cases in which the courts have condemned, as *per se* unreasonable restraints of trade, attempts by manufacturers to control the further distribution of their products after they have parted with all interest in them, include *Baldwin-Lima-Hamilton Corp.* v. *Tatnall Measuring Systems Co.*, 169 F. Supp. 1, 29–30 (E.D. Pa.), affirmed, 268 F. 2d 395 (C.A. 3), certiorari denied, 361 U.S. 894 (attempt by patentee to limit purposes for which patented article could be

resold), and *United States* v. *American Linen Supply Co.*, 141 F. Supp. 105, 114–115 (N.D. Ill.) (provisions in patent licensing agreements prohibiting licensees from soliciting customers of other licensees); cf. *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5.

The numerous cases cited by appellant (J.S. 10–11, 16–17) for the proposition that the lower federal courts have "uniformly" upheld attempted restrictions by manufacturers upon the areas in which and the persons to whom their distributors may sell are, as the district court explained at length (J.S. 53–62), inapplicable to the present case. They fall primarily into two categories: (1) Suits by a seller for the contract price of goods sold, in which the courts have rejected the contention that recovery should be denied because one of the terms of the contract involved an allegedly unlawful limitation on the purchaser's subsequent use of the product.[4] (2) Actions based on termination or denial of a franchise, in which the courts have found no violation of the Sherman Act because the manufacturer had merely exercised its

[4] See *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U.S. 165, 174–175; *Sinclair Refining Co.* v. *Wilson Co.*, 52 F. 2d 974 (W.D.S.C.); *Phillips* v. *Iola Portland Cement Co.*, 125 Fed. 593 (C.A. 8), certiorari denied, 192 U.S. 606. As this Court recently pointed out (*Kelly* v. *Kosuga*, 358 U.S. 516, 518–519, footnote omitted), "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court. * * * [T]he federal courts should not be quick to create a policy of nonenforcement of contracts beyond that which is clearly the requirement of the Sherman Act."

right to limit the number of its own dealers located within a particular area.[5] None of those cases supports the far-reaching restraints upon competition imposed by appellant's nation-wide system of allocating territories and customers.

B. The provisions in appellant's franchise agreements prohibiting dealers from selling to customers not having a place of business or purchasing headquarters within the franchised territory violate the Sherman Act for the further reason that they involve an unlawful geographical division of markets. Agreements dividing territories and customers among actual or potential competitors have long been recognized as *per se* unreasonable restraints of trade. *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (C.A. 6), affirmed, 175 U.S. 211; *Northern Pac.*

[5] See *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (C.A.D.C.), certiorari denied, 355 U.S. 822; *Schwing Motor Company* v. *Hudson Sales Corporation*, 138 F. Supp. 899 (D. Md.), affirmed, 239 F. 2d 176 (C.A. 4), certiorari denied, 355 U.S. 823; *United States* v. *Bausch & Lomb Optical Co.*, 45 F. Supp. 387 (S.D.N.Y.), affirmed on this issue by an equally divided Court, 321 U.S. 707; *United States* v. *Paramount Pictures*, 66 F. Supp. 323 (S.D.N.Y.), modified and affirmed, 334 U.S. 131; *Reliable Volkswagen S. & S. Co.* v. *World-Wide Auto Corp.*, 182 F. Supp. 412 (D.N.J.).

Boro Hall Corp. v. *General Motors Corporation*, 124 F. 2d 822, 130 F. 2d 196 (C.A. 2), the case which comes closest to supporting appellant's position, did not involve a restriction on the dealer's selling to customers outside his territory, as the court of appeals emphasized (124 F. 2d at 823). It involved a prohibition by General Motors against a single dealer's locating a used car lot at a site which would "unduly prejudice" rival dealers in new Chevrolet cars (*ibid.*). The character of the restraint was thus quite different from the broad restraint involved in the present case.

Railway Co. v. United States, 356 U.S. 1, 5; *Timken Roller Bearing Co. v. United States*, 341 U.S. 593; *United States v. National Lead Co.*, 63 F. Supp. 513 (S.D. N.Y.), affirmed, 332 U.S. 319; *United States v. Consolidated Laundries Corp.*, 291 F. 2d 563, 574–575 (C.A. 2); *Montana-Dakota Util. Co. v. Williams Elec. Coop.*, 263 F. 2d 431 (C.A. 8).

An agreement among appellant's dealers not to sell to customers in each other's areas would plainly be illegal. The adverse effect upon competition is the same, however, whether the dealers themselves enter into such agreements or whether, as in the present case, the restraints are imposed by a manufacturer under a nation-wide distribution system, which, through a series of interdependent, individual agreements with each distributor and dealer, limits territorially the customers to whom they may sell. Cf. *United States v. Masonite Corp.*, 316 U.S. 265, 276; *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44; *Snap-On Tools Corp.*, FTC Dkt. 7116, 3 CCH Trade Reg' Rep. ¶ 15,546 at p. 20,413. In either case, there has been "put together a combination in violation of the Sherman Act" (*Parke, Davis, supra*, p. 44), which completely deprives the public of the benefits of competition between dealers.

C. Appellant seeks to justify the territorial limitations which it imposes upon its distributors and dealers on the ground that, unless such persons are protected in their own territory against competition from other White dealers, they will not have an adequate incentive to promote vigorously the sale of appellant's products (J.S. 13–14). This claim of

business necessity is the same justification that has repeatedly been urged on behalf of price-fixing and other *per se* restraints, and that this Court consistently has rejected as a defense in such cases. *E.g., Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373, 407–408; *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457, 467–468.* As the Court recently explained (*Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5, emphasis added):

> * * * there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or *the business excuse for their use.* * * *

The "pernicious effect on competition" of the provisions in appellant's franchise agreements limiting the territories in which, and the persons to whom, its distributors and dealers may sell is obvious. For the purpose and effect of these provisions is to insure noncompetitive marketing practices and to insulate the market from competitive selling by individual dealers. Cf. Turner, *The Definition of Agreement Under the Sherman Act*, 75 Harv. L. Rev. 655, 679. The provisions are therefore "conclusively presumed to be unreasonable and therefore illegal * * *."

---

* See, also, *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 159; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 220–221.

Since there was thus no factual issue before the district court, and since the challenged contractual provisions on their face unreasonably restrained trade, the district court properly granted the government's motion for summary judgment. Cf. *Northern Pac. Railway Co.* v. *United States*, 356 U.S. 1; *International Salt Co.* v. *United States*, 332 U.S. 301; *Associated Press* v. *United States*, 326 U.S. 1.

II

Appellant's two challenges to the form of the judgment (J.S. 19) are without substance.

A. Appellant first contends that the judgment "does not sufficiently identify the provisions of said contracts which are adjudged to be illegal." The court's opinion, however, specifically sets forth the various contractual provisions challenged in this suit (J.S. 26–32), and in its Jurisdictional Statement appellant itself sets forth the various provisions attacked by the government (J.S. 6–7). In these circumstances, appellant can have no reasonable doubt as to the contractual provisions to which the judgment refers (J.S. 71–72) when it declares illegal appellant's contractual provisions:

> (A) purporting to impose limitations or restrictions on the territories within which, or persons or classes of persons to whom distributors and dealers may sell trucks, and
>
> (B) purporting to obligate distributors and dealers to sell trucks and parts at prices or discounts established by the defendant.

B. Appellant also contends (J.S. 19) that the injunctive provisions are "so broad as to enjoin * * * actions which are neither illegal nor actions which it is necessary or appropriate to enjoin in order to prevent resumption by the appellant of the actions found by the District Court to be illegal." The judgment of the district court, however, went no further than to enjoin the use of contractural provisions fixing resale prices and limiting the territories in which and the persons to whom resales might be made (J.S. 72). Appellant points to, and we know of, no actions, otherwise legal, which the judgment prohibits it from taking; in any event, "equity has power to eradicate the evils of a condemned scheme by prohibition of the use of admittedly valid parts of an invalid whole" (*United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, 724).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LEE LOEVINGER,
Assistant Attorney General.
RICHARD A. SOLOMON,
RICHARD H. STERN,
Attorneys.

FEBRUARY 1962.

U.S. GOVERNMENT PRINTING OFFICE: 1962